IN THE

Supreme Court of the United States

October Term, 1973

No._____

G. L. GIBBONS TRUCKING SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States court of appeals for the Ninth Circuit entered in the above-entitled case on January 21, 1974.

OPINIONS BELOW

The opinion of the court of appeals was filed on November 12, 1973. It was not reported and is found in the Appendix, *infra*. p. 1. Thereafter, petitioner filed a petition for rehearing and a suggestion for a rehearing en banc. That petition was denied on January 2, 1974. A copy of the court's order is included in the Appendix at p. 2. The judg-

ment of the court was filed and entered on January 21, 1974, a copy of which is included in the Appendix at pp. 3-7. The decision and order of the National Labor Relations Board (the Board) and Trial Examiner's decision are reported at 199 N.L.R.B. No. 88.

JURISDICTION

The petition for rehearing was denied on January 2, 1974 and the judgment of the court of appeals was filed and entered on January 21, 1974. The jurisdiction of this court is invoked under 28 USC § 1254(1) and Part V, Rule 19 of the Revised Rules of this court.

QUESTIONS PRESENTED

1. Is a decision and order of the Board finding that an employer was discriminatorily motivated in discharging an employee and thereby violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the Act) which is based almost exclusively on inferences adverse to the employer, supported by substantial evidence on the record considered as a whole, in the face of uncontroverted evidence in the record that show that the circumstances under which inferences of improper motivation might be invoked are not present?

2. In view of the proliferation of irreconciliable decisions of the court of appeals concerning the extent to which findings of the Board of unlawful employer motivation in discipline or discharge cases can be based on inferences, should this court expand on the guidelines set forth in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, and *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404 so as to insure

greater consistency in decisions both between the circuits and within the circuits?

STATUTE INVOLVED

The statutory provision involved herein is a portion of 29 USC § 158(a), reading:

> "158. Unfair Labor Practices
>
> "(a) It shall be an unfair labor practice for an employer –
>
> "(1) to interfere with, restrain, to coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> "(3) by discrimination of regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...."

STATEMENT OF THE CASE

This case involves the circumstances under which the Board can infer unlawful employer motivation in the absence of direct probative evidence of such motivation in cases involving alleged discrimination in violation of Section 8(a)(3) of the Act.

This case graphically illustrates the fact that in this one area of administrative law, at least, the teachings of this court in *Universal Camera, supra*, as refined in the area of unlawful discharges in *Walton, supra*, are inadequate to provide guidelines to insure consistency. Just as important as some

measure of consistency, is the appearance of consistency in decisions of panels of the courts of appeal in determining whether a Board's order based on such inferences, is, in fact, based on substantial evidence considering the record as a whole. There is not only inconsistency and an appearance of inconsistency between the various circuits, but also between panels of the circuits. The belief has arisen, rightly or wrongly, that in close cases the results may depend upon the court of appeals involved or upon the composition of the panel of a court, in other words, on the "luck of the draw."

A. *The Background and the Events Which Formed the Basis for the Charge.*

The case involves the discharge of one employee in a five-man bargaining unit, a subsequent strike to protest the discharge by three other employees, and the hiring of replacements by the employer. Insofar as this petition is concerned, only the issue of the initial discharge of one employee, Leroy Mason, is concerned. It is the employer's motivation which was and is the issue. If, as petitioner contends, there is not substantial evidence in the record as a whole supporting the Board's decision and order on this issue, the court of appeals and/or the Board would then have to consider further events with both factual and legal implications, which need not concern this court now.

The employer, G. L. Gibbons Trucking Service, Inc. (Gibbons), is a subsidiary of Gibbons Enterprises, Inc., which has operations in various places including South Point,

Nevada, which is located across the Colorado River from Bullhead City, Arizona. Its President is G. L. Gibbons (Mr. Gibbons) who resides in Tucson, Arizona. Some of its operations at other locations are unionized by the Teamsters, as are the operations of another subsidiary corporation of Gibbons Enterprises. Gibbons is operating at South Point pursuant to a contract with the Southern California Edison Company (Edison) to haul ash to adjacent locations, a by-product of Edison's large power plant located at South Point. The employees involved resided in and around Bullhead City, an unincorporated community with some 3,200 residents.[1]

Gibbons commenced operations at South Point late in 1970. By early 1971, there were several employees, all of whom worked under the supervision of Gibbons' foreman (and Mr. Gibbons' son-in-law) William Strunk. It is undisputed that as a result of a considerable pressure from Edison, with a large unionized work force, and unions representing Edison's employees and employees of Edison's contractors, respondent's three employees during the summer of 1971 decided to form their own union (TXD 2-3).[2] An independent union was formed in the fall of 1971, which bargained with Gibbons from October through December of 1971. The Board found that this union was unlawfully assisted and dominated by Gibbons, primarily because of the participation of Strunk in its affairs. Neither Mr. Gibbons, Strunk, nor the Las Vegas, Nevada attorney who formed the union realized that Strunk's participation "tainted" the Ash Haulers until after the discharge of the employee which is the

[1] Valley National Bank, ARIZONA STATISTICAL REVIEW, 28th annual edition, September 1972, p. 39.

[2] The trial examiner's decision will be cited TXD.

subject of this petition.

The organizers of the independent unit, known as the Ash Haulers of Nevada were Strunk, the foreman, and two employees, Dwight Olsen and Mark Vaughn. After the union was formed, Gibbons hired Leroy Mason as a cleanup man. He was later laid off for lack of work and thereafter recalled (TXD 5).

On one occasion in November during the period of time that the Ash Haulers were negotiating with Gibbons, Mason informed Strunk that he was a member of a Teamsters local based in Phoenix and asked Strunk if he should continue his membership in the Teamsters. Strunk advised him that he thought it was unnecessary as Gibbons had no contract with any local of the Teamsters at South Point (TXD 6). This casual conversation was the only direct evidentiary basis for the Board's later determination that Mason was subsequently discharged because of his participation in union activities.

By early December 1971, four of the then five rank and file employees (one, Dwight Olsen, was on sick leave) including Mason, had become dissatisfied with the lack of progress in negotiations between Gibbons and the Ash Haulers and decided to join an established union. Mason contacted a steward of Local 631 of the Teamsters who was employed by one of Edison's contractors. On December 6, the steward delivered membership application cards to Mason on the job site which he, in turn, individually gave to the other three employees then working. On December 8, the signed cards were returned to Mason. Mason also signed a card (TXD 6). No one contacted fellow employee Olsen, who was home recuperating from an operation, nor did they tell Strunk that cards were being circulated. Mason, who cir-

culated the cards, was not asked by the general counsel whether he distributed them to other employees at times and places where Strunk might have known what was going on, nor did the general counsel ever ask other employee witnesses whether they had any reason whatever to believe that Strunk knew the cards were being circulated. Based solely upon the small number of employees involved and the fact that Strunk was regularly present at the job site (TXD 17), the trial examiner and the Board found that the so-called "small plant" inference was applicable and that knowledge of Mason's card circulating activities could be inferred to the employer.

Mason, whose work primarily consisted of cleanup, had been told on occasions by Strunk that he was dissatisfied with his performance as a cleanup man. Mason did not contradict Strunk's testimony. Strunk returned to South Point from a Christmas visit to Tucson on December 28. During his absence Mason had been given some instructions by another employee about how to drive one of the large trucks used by Gibbons at South Point. The employee told Strunk that Mason had been somewhat careless. On the afternoon of December 28, one John Knight, the owner of a business in Bullhead City, visited Strunk at the job site and observed Mason working. Knight, who testified, told Strunk that Mason had injured his back while working for him in the past and that he did not consider him to be a desirable employee (TXD 7). Later that day Strunk talked to employee Olsen in Bullhead City and told him that he intended to discharge Mason because he was worried about Mason's sustaining a back injury and because he was generally an unsatisfactory employee. On that occasion, Olsen told Strunk that Mason had had a disagreement with a former employer

in Bullhead City. Strunk thereafter talked with another friend in Bullhead City who informed him that Mason had trouble with two other companies where he worked. None of Strunk's testimony was contradicted, including the testimony that he had been somewhat dissatisfied with Mason's work performance as a cleanup man and had conveyed this dissatisfaction to Mason.

In the evening of December 28, Strunk called Mason and told him not to report the following morning, that he was fired, and that he would give him the reason when he brought his check in the morning. Mason testified that he was of the opinion that his discharge was the result of his organizing activities on the job for Local 631 although neither he nor any other witnesses offered any reason for believing that Strunk had any knowledge of any such activities.

Mason's discharge precipitated a strike by the other employees working. The events that ensued after the strike commenced are not pertinent to this petition, except that the subsequent conduct of Strunk, who was obviously guilty of immaturity, bad judgment, incorrect relaying of instructions, and perhaps one or more unfair labor practices, may well have distracted the attention of the trial examiner, the Board, and the court of appeals from the employer's lack of knowledge of Mason's card circulating activities.

B. *The Proceedings Below and the Circumstances Under Which the Board Utilized the "Small Plant" Inference.*

As a result of the discharge of Mason and subsequent events, charges were filed by the union with the Board. With respect to the discharge of Mason, the trial examiner and the Board concluded that the discharge was pretextual

and, that in fact, Mason was discharged because of his participation in protected activities. Although there is concededly no evidence whatever that Strunk or any other representative of Gibbons knew that Mason had circulated the cards, the trial examiner and the Board relied on the "small plant" inference. Neither the trial examiner nor the Board deigned to analyze or discuss the inference and explain why, in their view, it applied to the situation. Among the undisputed facts which the trial examiner and Board apparently failed to consider (the points were argued by petitioner in briefs to both the trial examiner and the Board) were the following: there was no evidence as to the size of the area where the employees work; Mason gave the cards to the other employees individually, not at a meeting of any kind; Mason testified that he did not advise Strunk or Olsen of the fact that the cards had been circulated and knew of no one else that had; neither Mason nor anyone else testified that the circumstances under which he circulated the cards were such as to make him believe that Strunk might have known about it; Mason was not discharged until December 29, although the cards were circulated early in December; none of the card signers contacted fellow employee Olsen, a member of the potential bargaining unit; although the cards were passed out by Mason to the three other employees on December 6, they were not all finally returned until the 8th; December 6, 7 and 8 were all working days, suggesting that the cards were covertly circulated; Mr. Gibbons had plans to fly to Bullhead City on December 30 to hold a negotiating session with the Ash Haulers Union, and those plans were not changed after a time when the Board inferred that Strunk knew about the cards being circulated. In addition, neither the general counsel, the trial examiner, nor the Board ever

attempted to explain how Mr. Gibbons, a sophisticated businessman with long experience in dealing with Teamster locals, thought the discharge of only one employee could do anything other than create or aggravate a problem, rather than solve one.

It was bad enough for the trial examiner and the Board to invoke the "small plant" doctrine, but the "felony" was compounded by their failure in any way to discuss or analyze the doctrine or articulate the reasons why it was applicable or the reasons why the points raised by the employer were not persuasive.

The general counsel had ample opportunity to bring out facts which might arguably have made the small plant inference fir the situation by asking questions of employee witnesses, all of whom the trial examiner uncritically credited (he discredited all employer witnesses but Knight) but he chose not to. As the general counsel had the burden of proof, counsel for petitioner, who, contrary to the trial examiner, thought that the employee witnesses were fully capable of lying to support their claims, adopted what the then Chief Judge Friendly of the Second Circuit characterized as "...the wise policy of leaving a satisfactory record alone rather than asking that 'one more question' which all too often leads to disaster." *H&F Binch Co. v. N.L.R.B.*, 456 F.2d 357 (2nd Cir. 1972) footnote 7 at 364.

The decision and order of the Board were affirmed by a per curiam decision of the panel of the court of appeals. Chief Judge Chambers, a member of the panel, dissented as to the discharge of Mason, the issue which this petition presents to this court.

REASONS FOR GRANTING THE WRIT

In this case, the court of appeals has decided a case involving the most important unresolved question involving the application of *Universal Camera, supra*, to the Act not heretofore decided by the court, the use of inferences in cases involving discharges. Other courts of appeals and panels of the same courts of appeals have grappled with the same issue and it remains unresolved some twenty years after this court's decision in *Universal Camera*. As a result of a lack of guidelines, there is a hopeless conflict of decisions between circuits and, even more embarrassing, of panels within circuits. This case therefore presents an issue in one of the only areas of the administration of the Act which has spawned considerable litigation and to which this court has not heretofore specifically addressed itself.

Because, in petitioner's view, the court of appeals has, in this case, sanctioned use of an inference piled on top of an inference not supported by evidence, and, which in fact, is contrary to the state of the record, to an extent no other court of appeals or panel thereof has heretofore done, two of the considerations set forth in Rule 19 of the Rules of this court are here present: one, that an extremely important question of federal law has not and should be decided by this court; and, two, there is a conflict in the decisions of the courts of appeals involving numerous cases. As a practical matter the second may flow from the first. When this court decided *Universal Camera* and, in effect, directed the courts of appeals to be less uncritical of decisions of administrative agencies, it no doubt hoped that the various courts of appeals would set forth guidelines, on a case by case basis, on issues concerning the substantiality of evidence support-

ing decisions of administrative bodies. This has proved to be the case in many areas of administrative law. That has not been the case in the situation here involved, which is particularly unfortunate because of the volatile and emotional nature of the issues involved and the number of cases involved.

1. *Conflict of Decisions.*

Petitioner will not describe in detail why the cases cited by the Board in its brief to the Ninth Circuit in support of the so-called small plant inference are not applicable here. A perusal of all of them demonstrates that without the need of detailed exposition. Taking them *seriatim* as they appear in the Board's brief they involve: a situation where there was open union activity and the company was never able to settle on the reason for the discharge of the employee involved, even by the time the matter went to hearing;[3] a case involving a situation where the company had carried on "a wide-spread systematic interrogation to determine where each employee stood on the union question";[4] a case involving a plant with some 200 employees in a community of only 2,000 with ample direct evidence of company knowledge of the employees' union activities;[5] and a case involving a situation where an employee was discharged for an offense for which other employees had never been discharged.[6]

[3] *A. J. Krajewski Manufacturing Co., Inc. v. N.L.R.B.*, 413 F.2d 673, 676 footnote 2 (1st Cir. 1969).

[4] *Sterling Aluminum Company v. N.L.R.B.*, 391 F.2d 713, 717 (8th Cir. 1968).

[5] *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 697 (8th Cir. 1965).

[6] *Don Swart Trucking Co., Inc.*,, 154 N.L.R.B. 1345 (1965), enforced 359 F.2d 428 (4th Cir. 1960).

All the cases from the circuit courts cited by the Board in support of the small plant inference involved situations where there was direct evidence that the company knew of union activity.

In its brief to the Ninth Circuit the Board cited one case from this court supposedly in support of its application of the small plant inference, *N.L.R.B. v. Link Belt Co.*, 311 U.S. 584, 602 (1941). How this case supports the application of the small plant inference in petitioner's situation or in any other is a mystery to petitioner. The court's opinion indicated that one of two competing unions that was there involved had about 400 members.[7] The Board's decision and order reflects that the plant there involved had a work force of between 750 and 1200 employees (XII N.L.R.B. 854, 857, 1939), hardly a small plant.

An exhaustive exposition of the cases where circuit courts of appeals have denied the court's enforcement of the Board's orders where the evidence with respect to employer motivation is far stronger than is found here would serve no purpose. Suffice it to say that there has been and is a serious lack of consistency. For example, the Tenth Circuit, in *N.L.R.B. v. Acker Industries, Inc.*, 460 F.2d 649 (10th Cir. 1972), denied enforcement in a situation where evidence of employer motivation was stronger than was the case here. Some of the opinions of the circuit courts demonstrate their frustration in attempting to come to grips with situations such as are involved here. For example, in *N.L.R.B. v. Century Broadcasting Corp.*, 419 F.2d 771 (8th Cir. 1969), a case in which a panel of the Eighth Circuit declined to enforce the Board's order, Judge Lay, dissenting, lamented

[7] 311 U.S. at 589.

the inconsistencies in Eighth Circuit decisions.[8] Samples of the many cases where employer knowledge of the discharged employees' engagement in protected activities could be more readily and rationally inferred than in the instant case include: *N.L.R.B. v. Fontainbleau Hotel Corp.*, 300 F.2d 662 (5th Cir. 1962); *N.L.R.B. v. Isis Plumbing & Heating Co.*, 322 F.2d 913 (9th Cir. 1963); *N.L.R.B. v. Falls City Creamery Co.*, 207 F.2d 820 (8th Cir. 1955); and *N.L.R.B. v. Meinholdt Manufacturing, Inc.*, 451 F.2d 737 (10th Cir. 1971). Enforcement of the Board's order was denied in each of the foregoing cases.

2. *The Importance of the Issue.*

In a series of cases, this court has attempted to come to grips with the problems inherent in assessing the motives and intent in situations involving issues of whether or not employer conduct inherently affected employee rights protected by Section 7 of the Act, and in particular whether, under the circumstances, unlawful motive is required. Many of those cases are discussed in *Christensen, Motive and Intent in the Commission of Unfair Labor Practices*: Yale L.J., Vol. 77, 1968 at p. 1269. Those cases do not involve a situation such as we have here, where if the employer's motivation was unlawful, his act, discharge, is inherently discriminatory. However, the holdings of this court in several of those cases are highly pertinent to the issues this petition presents. As Professor Christensen points out, under the rule enunciated in *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954), where there is no direct evidence of motive in a finding of a violation, a determination requires that unlawful

[8] *Supra*, 419 F.2d at 783.

intention be established by inference and if inference becomes essential, "the basis on which the inference can be sustained becomes even more vital." Christensen, *supra*, at p. 1329. In a case decided after *Radio Officers, supra, Teamsters Local 357 v. N.L.R.B.*, 365 U.S. 667 (1961), involving union hiring halls, the Board attempted to treat the subject on the basis of its expert knowledge as to the impact of union controls of employment opportunities on the exercise of employees' rights. Motive was therefore established by inference. This court "*...in rejecting this approach, made it evident that the Board's power to infer any element of the violation was sharply circumscribed.*"[9]

The problem presented by inconsistent decisions of the courts of appeals was recognized in the landmark book, *Morris, The Developing Labor Law*, the 1970 product of a joint effort of members of the section of Labor Relations Law of the American Bar Association, representing management and unions alike. In that treatise, the acknowledged single volume authority on the subject of labor law, the authors frankly state:

> "But even with the Supreme Court's *Walton* decision, there will undoubtedly continue to be differences in interpretation among the circuit courts of appeal as to the application of the substantial evidence test, because that test, as developed in *Universal Camera*, is not a rigid formula or a closely defined standard; rather, it expresses a flexible and general approach to review administrative determinations. *It will necessarily be fitted to some extent to the predilections of the particular court.*" The Developing Labor Law, op cit., at 883 (emphasis supplied).

Among the unfortunate byproducts of the unsettled state

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[9] Christensen, *supra* at p. 1319 (emphasis supplied).

of any issue in the volative area of labor law are the practices of the so-called "race to the courthouse" and forum shopping.[10] While the Board's practice is to seek enforcement of its orders in the circuits where the allegedly unfair labor practice occurred, the employer or any other aggrieved party can seek review in the circuit where the alleged unfair labor practice was committed, in the District of Columbia, or in any circuit where the employer transacts business.[11] In the most recent fiscal year for which statistics are available, 1972, over 81 percent of Board proceedings decided by U.S. courts of appeals, aside from Board dismissals of charges, involved charges against employers.[12] To the extent that some circuits are more reluctant than others to affirm orders of the Board, it is obvious that employers against whom the Board has charges it seeks to enforce have a better "batting average" in these circuits than in other circuits. To illustrate, the Board's Thirty-Seventh Annual Report discloses (at page 269) that during the cumulative fiscal years 1967-71, the Ninth Circuit affirmed in full 76.6 percent of the Board's orders before it, a percentage exceeded by no other court of appeals. On the other hand, during the same fiscal years, the Eighth Circuit affirmed only 39.8 percent of the Board's orders in full. Some divergency between circuits can be expected because of the nature of the commercial activities found within the circuit, the extent

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10 See, for example, *Chatham Mfg. Co. v. N.L.R.B.*, 404 F.2d 116 (4th Cir. 1968) and *International Union of Electrical Radio and Machine Workers v. N.L.R.B.*, 348 F.2d 327 (D.C. Cir. 1965).

11 *Winn-Dixie Stores, Inc. v. N.L.R.B.*, 448 F.2d 8 (4th Cir. 1971). a Florida case with Florida counsel, which, nevertheless went to the Fourth Circuit.

12 Thirty Seventh Annual Report of the National Labor Relations Board for the Fiscal Year ending June 30, 1972, page 268.

to which employers within the circuit are unionized, and other such factors. However, petitioner suggests, in all candor, that such factors do not account for most of the discrepancies between the circuits, which are the result of the unconscious philosophies and predilections of the judges. Judges, being human, cannot escape from such philosophies and predilections, however much they may wish to do so. Petitioner in no way implies any conscious bias on the part of any circuit judge. However, human beings are imperfect and petitioner suggests that it is in a situation precisely like the one presented by the instant case, an emotional area of law with general guidelines, where the unconscious predilections of the judge are more likely to influence his or her opinion.

The concern this issue has given the courts is illustrated by a recent decision of a panel of the Ninth Circuit Court of Appeals composed of entirely different judges from the panel which decided the instant case. In *Famet, Inc. v. N.L.R.B.* No. 73-1382, decided December 27, 1973, 73 CCH LC § 14,222, Circuit Judge Ely, speaking for the panel, had some comments which we believe illustrate the dilemma which the courts face in reviewing Board decisions based largely upon inferences. After stating that the court felt that there was substantial evidence to support the Board's order, although suggesting that it might have decided the case otherwise had it had the power to do so *de novo*, Judge Ely had the following comments:

> "The case is close, however, and we think that it is not inappropriate to remind the Board that it must exercise especially careful judgment in a case such as this and that it carries the burden of proof.
>
> "The Board must be as impartial as the courts,

serving both union and management, as well as the public at large, with impartiality. If the Board applies this principle – and we think it almost always deos – then it will not invite unto itself such biting criticism as appears in *N.L.R.B. v. Billen Shoe Co.*, 397 F.2d 801 (1.Circuit 1968). We need not reiterate the criticism there written but we do remind the Board that in reviewing Board determinations of the kind here questioned, we will always have in mind the concluding language of Judge Aldrich's in *Billen*:

'If we were to draw a further lesson from this case, and too many others like it we have had, it is that it is all too easy to say that adequate cause for discipline was seized upon as pretextual in the case of union representative.' " 397 F.2d at 803.

73 CC LL § 14,222, at p. 28, 750.

That the inconsistencies that have arisen trouble the courts of appeals is self-evident. The fact that decisions in close cases cannot be reconciled, and the number of cases involved, itself presents an important unresolved question of federal law to this court.

CONCLUSION

For 23 years since this court's decision in *Universal Camera* the courts of appeals have operated independently of each other in deciding whether or not to enforce orders in close cases involving discharges where the Board has inferred unlawful employer motive. These orders of the Board have been considered on a case by case basis without any attempt on the part of the courts of appeals to establish guidelines, which would seem to be what this court hoped would result from the decision in *Universal Camera*. That establishment of guidelines in this area would be very difficult petitioner does not deny. However, the absence of such guidelines has

led to the appearance of inconsistency and to inconsistency itself. In a close case involving discharge, the determination of whether an employer must ultimately reinstate a discharged employee or employees and be assessed with back pay may depend on factors such as where the employer transacts business, whether he is affluent enough to afford to retain counsel to exhaustively litigate the matter and, even if he is, on the composition of a panel of a court of appeals. Obviously, such factors should not be determinative. While petitioner is not in accord with much of the criticism of this court's decisions expressed by Professor Christensen in the law review article heretofore referred to, we submit that Professor Christensen's conclusion: namely, "...that the court must reassess both motive and its necessary evidentiary support in terms which will better disclose...the 'actual grounds' of decision,"[13] is applicable to the issue presented by this petition.

With the exception of *Walton*, this court has not addressed itself to what factors should be considered by the courts of appeals in determining whether there is substantial evidence on the record considered as a whole in support of findings of the Board of unlawful employer motivation in Section 8(a)(3) discharge cases. As such cases constitute much of the litigation spawned by the Act, petitioner submits that the time has come when this court should devote its attention to the issue presented by this petition, however troublesome and difficult its solution may be. The question is important and unsettled and deserves to be settled in the interest of a fair and consistent administration of the Act.

It is respectfully submitted that a writ of certiorari should

13 Christensen, *op. cit.* at p. 1270.

issue to review the decision of the court below.

Respectfully submitted,

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Of Counsel

March, 1974.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. L. Gibbons Trucking Service, Inc.,
Petitioner, No. 72-2837

vs. ORDER

National Labor Relations Board,
Respondent.

[November 12, 1973]

Before: CHAMBERS, CARTER, and GOODWIN, Circuit Judges.

PER CURIAM:

The court finds that Board's proposed order should be enforced.

The Board will prepare and submit a self sufficient decree.

As to the employee, Mason, Chambers, Circuit Judge, dissents.

FILED
Jan 2 1974
[Clerk's stamp]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKETED

G. L. GIBBONS TRUCKING SERVICE, INC., Petitioner,) No. 72-2837
vs.
NATIONAL LABOR RELATIONS BOARD, Respondent.) ORDER

Before: CHAMBERS, CARTER and GOODWIN, Circuit Judges.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

All judges of the court have been notified of the suggestion for a rehearing en banc and no judge has requested a rehearing en banc.

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

G. L. GIBBONS TRUCKING SERVICE, INC.,	)	
Petitioner,	)	
v.	)	No. 72-2873
NATIONAL LABOR RELATIONS BOARD	)	
Respondent,	)	

JUDGMENT

Before: Chambers, Carter, and Goodwin, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of G. L. Gibbons Trucking Service, Inc., to review an order of the National Labor Relations Board issued against it on October 10, 1972, and upon a cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 7, 1973, and has considered the briefs and transcripts of record filed in this cause. On November 12, 1973, the Court being fully advised in the premises, entered an order, granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that G. L. Gibbons Trucking Service, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge or refusal of future employment because of their union or protected concerted activities, including striking.

(b) Interrogating coercively its employees con-

cerning their union activities or membership.

(c) Telling employees that it will negotiate or enter into a contract with another labor organization if they will withdrawn [sic] their support from their chosen labor organization or persuade such labor organization to withdraw its representation petition filed with the National Labor Relations Board.

(d) Threatening striking employees that they will not be reinstated to their former positions unless they persuade their chosen labor organization to withdraw its representation petition filed with the National Labor Relations Board.

(e) Dominating or interfering with the administration or formation of the Ash Haulers of Nevada, Inc., or any other labor organization of its employees, or contributing financial or other support to said Ash Haulers or any other labor organization of its employees.

(f) Recognizing, or in any manner dealing with, said Ash Haulers, or any reorganization or successor thereof, as a representative of any of its employees for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of work or any other items and conditions of employment.

(g) Discouraging membership in Teamsters Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (hereinafter called Local 631), or any other labor organization of its employees, by discharging employees because of their union or protected concerted activities, including striking, or by failing and refusing to reinstate unfair labor practice strikers to their former or substantially equivalent positions

after thier unconditional offer to return to work, or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(h) In any other manner interferring with, restraining or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Withdraw all recognition from said Ash Haulers as a representative of any of its employees for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay hours of work, or any other terms and conditions of employment, and completely disestablish said Ash Haulers as such representative.

(b) Upon request, bargain collectively with the aforesaid Local 631 as the exclusive representative of its employees in the appropriate unit found herein with respect to rates of pay, wages, hours and all other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Offer LeRoy Mason, Mark Vaughn, Ronnie I. Jenkins, and Brian Fountain each immediate and full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make each whole for any loss of pay he may have suffered by payment to him of a sum of money equal to that which he would normally have earned from, in the case of Mason, December 28, 1971, as the date of his discharge; in the case of Vaughn

December 29, 1971, the date of his discharge; and in the cases of Jenkins and Fountain, January 3, 1972, the date of their unconditional offer to return to work, to the date of the above-required offer of reinstatement by Respondent, less the net earnings of each durning [sic] said periods (Crossett Lumber Company, 8 NLRB 440), said backpay to be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289, togehter with interest thereon at the rate of 6 percent per annum (Iris Plumbing & Heating Co., 138 NLRB 716).

(d) Immediately notify the above-named employees if presently serving in the Armed Forces of the United Forces of their right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(e) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and all other records necessary to determine the acount [sic] of backpay due under this Judgment.

(f) Post at its office in Tucson, Arizona and its facility in South Point, Nevada copies of the attached notice marked Appendix Copies of said notice, on forms provided by the Regional Director for Region 31, Los Angeles, California, after being duly signed by Respondent's representative shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable

steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Judgment, what steps Respondent has taken herewith.

Approved judgment filed and entered January 21, 1974

/s/ Emil E. Melfi, Jr., Chief Deputy and Acting Clerk

/A TRUE COPY

ATTEST January 21, 1974
Emil E. Melfi, Jr.,
Chief Deputy and Acting Clerk/

by /s/ Ray Hewitt
Ray Hewitt, Deputy

With costs in this court in favor of the Board and against the petitioner.
Costs:
Brief of the Board..... 179.80

SO ORDERED

/s/ Richard H. Chambers
/s/ James M. Carter
/s/ Alfred T. Goodwin
Circuit Judges

FILE COPY

Supreme Court, U.
FILED
APR 1 1974
MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1465

G. L. GIBBONS TRUCKING SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX

DECISION AND ORDER OF
THE NATIONAL LABOR
RELATIONS BOARD and
TRIAL EXAMINER'S DECISION

199 NLRB No. 88 D--6767
South Point, Nev.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

G. L. GIBBONS TRUCKING
SERVICE, INC.

and Cases 31--CA--2817
31--CA--2944

TEAMSTERS LOCAL UNION
NO. 631, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
& HELPERS OF AMERICA

DECISION AND ORDER

On June 21, 1972, Administrative Law Judge[1] Robert L. Piper issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in answer thereto.

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[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his

---

[2] We agree, for the reasons set forth by the Administrative Law Judge, that Respondent had knowledge of Mason's union activity, but find additional support for this conclusion from the fact that although Respondent's president stated that he took no part in the hiring or firing of employees prior to learning of the union activity, which he contended was as a result of the strike, he concededly spoke with Strunk concerning Mason's discharge and approved the hiring of a replacement for him a day before the strike began.

recommended Order, as herein modified.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, G. L. Gibbons Trucking Service, Inc., South Point, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as herein modified:

Delete paragraph 2(c) and

---

[3] The Administrative Law Judge erroneously concluded that Vaughn was entitled to backpay only from the date of his unconditional offer to return to work. However, Vaughn was discriminatorily discharged on December 29, 1971, prior to his joining the strike. Vaughn, therefore, is entitled to reimbursement for backpay from the date of his discharge. Cf. Cone Brothers Contracting Company, 161 NLRB 937.

substitute the following:

"(c) Offer LeRoy Mason, Mark Vaughn, Ronnie I. Jenkins, and Brian Fountain each immediate and full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make each whole for any loss of pay he may have suffered by payment to him of a sum of money equal to that which he would normally have earned from, in the case of Mason, December 28, 1971, as the date of his discharge; in the case of Vaughn December 29, 1971, the date of his discharge; and in the cases of Jenkins and Fountain, January 3, 1972, the date of their unconditional offer to return to work, to the date of the above-required

offer of reinstatement by Respondent, less the net earnings of each during said periods (Crossett Lumber Company, 8 NLRB 440), said backpay to be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289, together with interest thereon at the rate of 6 percent per annum (Isis Plumbing & Heating Co., 138 NLRB 716)."

Dated, Washington, D.C.

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

TXD-(SF)-105-72
Las Vegas, Nev.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

G. L. GIBBONS TRUCKING
SERVICE, INC.

and

Cases 31-CA-2817
31-CA-2944

TEAMSTERS LOCAL UNION
NO. 631, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
& HELPERS OF AMERICA

Glenn A. Sunness, Esq.,
for the General Counsel.
Evans, Kitchel & Jenckes, P.C.,
by Stephen W. Pogson, Esq., of
Phoenix, Ariz., for Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

ROBERT L. PIPER, Trial Examiner: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was heard at Las Vegas, Nevada on April 4 and 5, 1972, pursuant to due notice. The consolidated complaint, which was issued on March 15, 1972 upon a charge filed January 18, 1972

and a charge filed February 29, 1972, alleged in substance that Respondent engaged in unfair labor practices proscribed by Section 8(a)(1), (2) and (3) of the Act by: (1) various specified acts of interference, restraint and coercion; (2) dominating and interfering with the formation and administration of, and contributing financial and other support to, Ash Haulers of Nevada, Inc. (hereinafter called the Ash Haulers), a labor organization; (3) on December 28, 1971 1/ discriminatorily discharging LeRoy Mason; (4) on December 29 discriminatorily discharging three named employees because of their union or protected concerted activities, namely, striking; and (5) failing and refusing thereafter to reinstate said employees, although the striking employees made an unconditional offer to return to work. Respondent's answer denied the alleged unfair labor practices. The General Counsel and Respondent filed briefs.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdictional Findings

Respondent is an Arizona corporation

1/ All dates hereinafter refer to 1971 unless otherwise indicated.

engaged in trucking services with its principal office and place of business located in Tucson, Arizona, and with one of its facilities located at South Point, Nevada, where it is engaged in providing ash hauling services pursuant to contract. During the past year, Respondent received gross revenues from its ash hauling operation at its South Point facility in excess of $50,000, which revenues were derived from services rendered to a firm directly engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Teamsters Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter called Local 631) and the Ash Haulers are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Introduction and Issues

During the latter part of 1970 Respondent commenced its ash hauling services at the South Point generating plant of Southern California Edison (hereinafter called Edison) pursuant to contract with Edison. Edison and its various contractors at the South Point plant employed approximately

1,000 employees, all of whom belonged to various unions, including Local 631. At that time Respondent's work force at its South Point facility consisted of one foreman and three employees, none of whom were unionized. Their job consisted of hauling from the plant by truck ash generated by Edison and dumping it in adjacent canyons on Edison's property. Respondent's only supervisor was William Strunk, the foreman. He was the son-in-law of G. L. Gibbons, the president of Respondent as well as of Gibbons Enterprises, of which Respondent was a wholly-owned subsidiary.

As a result of considerable pressure from Edison and the unions representing its employees and its contractors' employees, Respondent's three employees, under the guidance and leadership of Strunk, decided to form their own union, primarily in order to retain their jobs at the plant site. During August, September and October they formed the Ash Haulers with the assistance of an attorney, and formal articles of association were filed with the Secretary of State of the State of Nevada. Strunk was one of the three "incorporators" or organizers of the Ash Haulers and was elected an officer and director. During October Respondent hired two additional employees. Ensuing bargaining negotiations with Respondent were unsuccessful. As a result the four working employees (one was on extended sick leave) decided to seek union representation elsewhere, and one of them secured

membership application cards from Local 631 and distributed them at the jobsite to the others. All four signed such cards on December 7 and 8 and delivered them to Local 631. On December 20 Local 631 filed a representation petition with the Board in Los Angeles. On December 28 Respondent fired the employee who had organized the other employees. On December 29 two of the remaining three employees engaged in a strike and they and the dischargee began picketing Respondent's South Point facility at Edison's main gate. The other employee was at home on sick leave that day. On December 29 Respondent discharged the two striking employees and the employee who was at home on sick leave. On December 30 that employee joined the picketing. Various negotiations and proposals between Respondent and the four striking and picketing employees ensued. At various times between December 28 and 31, Respondent made various arrangements to secure future replacements for the discharged and striking employees. On January 3, 1972, the two striking employees and the employee discharged on December 29 while on sick leave unconditionally offered to return to work. Respondent rejected their offer.

The issues as framed by the pleadings are: (1) on and after August 29, Respondent's initiating, forming, sponsoring, promoting, assisting, dominating, contributing to the support of and interfering with the Ash Haulers; (2) on December 28, discharging LeRoy Mason and thereafter failing and

refusing to reinstate him because of his union or concerted activities; (3) on December 29, discharing Mark Vaughn, Brian Fountain and Ron Jenkins, and thereafter failing and refusing to reinstate them although the made an unconditional offer to return to work on January 3, 1972, because of their union or protected concerted activities, including striking; and (4) interference, restraint and coercion by the aforesaid activities and by (a) threatening employees that future employment was conditioned upon their abandoning support for Local 631; (b) interrogating an employee about his union membership and activities; and (c) informing employees that Respondent would sign a contract immediately with the Ash Haulers if the employees withdrew their support from Local 631.

The complaint further alleged that the strike was caused and prolonged by Respondent's unfair labor practices, that Respondent engaged in the alleged discrimination and interference, restraing and coercion to undermine Local 631 and destroy its majority status, and that because of such alleged unfair labor practices a bargaining order should issue. Respondent's answer affirmatively alleged that the strike was for recognition, that each of the striking employees had voluntarily quit, and that the striking employees were permanently and lawfully replaced.

B. Chronology of Events

Respondent commenced operation of

its ash hauling and other services at the Edison plant in South Point, Nevada, in September or October, 1970. Until October of 1971 Respondent had only three employees at its South Point ash hauling facility, Dwight Olson, truckdriver, Mark Vaughn, heavy equipment (tractor) operator and Brian Fountain, ash dumping equipment operator and cleanup man. Respondent's only supervisor at the facility was William Strunk, foreman. During April Respondent was engaged in some additional coal hauling services for Edison at the South Point facility, and G. L. Gibbons, Respondent's president, was present. Respondent's coal hauling truckdrivers were not members of any union. A representative of Local 631 required Gibbons to have his trucks manned by members of Local 631. Although Gibbons protested, he capitulated, laid off his own drivers, and used members of Local 631 to drive his trucks at that time for a period of five or six weeks.

As previously noted, all of the approximately 1,000 employees of Edison and its contractors at the South Point plant were union members and the only employees on the entire facility who were not union members were Respondent's three employees. During the summer of 1971 considerable pressure was brought by the various unions, particularly Local 631, representing the other employees at the facility, upon Strunk and his employees, particularly Olson, the truckdriver, to become unionized. Olson was strongly opposed to Local 631.

During July Edison and others brought pressure on Respondent to discharge its three non-union employees, namely, all of its employees at the facility. As a result Respondent did so, whereupon the three employees filed charges with the Board, and Respondent reemployed them approximately three days later. However, Respondent and its employees continued to receive pressure to become unionized.

Strunk told the employees that they should become unionized in order not to lose their jobs. Strunk suggested to Olson that it might be feasible for the employees to form their own independent labor organization. The record establishes that Strunk was the instigator of the idea. Strunk contacted Gibbons and he agreed that it would be a good solution. Strunk and Olson then suggested this to the other two employees. All three employees agreed that if possible it would be a good idea in order to retain their jobs. At Gibbons' suggestion, Olson, the senior employee, tried without success to secure an attorney to form an independent union. Olson told Strunk that Olson was unable to find an attorney to handle such a matter and Strunk contacted Gibbons. Gibbons advised Strunk to call Gibbons' attorney to request help in finding a Nevada attorney to set up an independent union. Strunk did so. Gibbons' attorney referred him to a Las Vegas law firm, Goodman & Snyder. Strunk relayed this information to Olson who contacted Goodman during late August or early September.

Goodman agreed to set up such a labor organization by drafting articles of association under the Nevada law which were filed with the Secretary of State of Nevada as "articles of incorporation." The procedure required three "incorporators" or organizers, called directors, and the organizers and directors were Strunk, Olson and Vaughn. As such on September 29 they signed the articles of association of the Ash Haulers. On October 4 at a meeting of said directors they elected Olson president and Strunk secretary-treasurer of the Ash Haulers, its only officers, and adopted an initiation fee of $100 for membership in the Ash Haulers, with dues of $8 per month. The same day the articles of association were filed with the Secretary of State of Nevada who issued a charter to the Ash Haulers. Goodman was appointed resident agent and his office became the Ash Haulers' principal office.

On October 4, Respondent hired LeRoy Mason as cleanup man in place of Fountain, who was out on sick leave. On October 24, Respondent hired Ronnie I. Jenkins as truckdriver to replace Olson, who was hospitalized and remained on sick leave thereafter throughout the incidents herein. On October 29, Respondent laid off Mason because Fountain returned from sick leave and Respondent did not need four employees at the time. On November 3, Respondent recalled Mason to his job and thereafter continued with four employees. During September, October, November and December, Respondent engaged in "bargaining

negotiations" with the Ash Haulers as the representative of its South Point employees without any agreement being reached. Strunk acted as the bargaining representative of the Ash Haulers and dealt directly with Gibbons, who was located at Respondent's principal office in Tucson. Thus the "bargaining" took place between Respondent's president and his son-in-law, its only supervisor at the South Point facility. At the first meeting of the members of the Ash Haulers concerning its bargaining proposals, Strunk suggested that they use the contract between Edison and its employees' union as a guide to the type of contract they should seek from Respondent. The member-employees adopted some 20 proposals for improved wages and benefits which Strunk later presented to Gibbons. Gibbons rejected most of the proposals and counterproposed several items. Various proposals and counterproposals continued for several months into December without agreement. The employees became dissatisfied with the lack of progress and the arrangement, particularly their inability to meet with Gibbons, and wanted him to come to South Point so that they could negotiate directly rather than through Strunk.

Sometime during October, Goodman presented the Ash Haulers with a bill for $1000 plus costs for his services in setting up the Ash Haulers and drafting the articles of association. The bill was sent to Olson as president at Bullhead City, Arizona, some 12 miles

from the South Point facility, where Strunk and the employees resided. Previously thereto the employees had been concerned about how with their limited income they would be able to pay for the services of an attorney in setting up the Ash Haulers, and Strunk assured them that Respondent would foot the bills. During September and October, Respondent through Strunk advanced Olson $800 for "car rental." The record establishes that Olson used $700 of this "advance" to make payments on account on Goodman's bill. While Goodman's second bill was also sent to Olson on November 3, the subsequent two bills on January 4, 1972 and March 10, 1972 were sent to Strunk. The record establishes that only Strunk and Olson paid the $100 initiation fee to the Ash Haulers. Thus the $800 paid Olson by Strunk from Respondent's funds covered the $700 paid to Goodman and the $100 initiation fee paid by Olson.

In late November Mason informed Strunk that Mason was a members of a Teamsters' local in Phoenix and asked if he should continue his membership in the Teamsters. Strunk advised him not to do so but to take a withdrawal card because Respondent had no contract with the Teamsters or Local 631. Because of the four working employees' dissatisfaction with the lack of progress in bargaining with Respondent through the Ash Haulers, and their inability to meet directly with Gibbons, they decided it might be preferable to join an established labor organization.

Mason, Vaughn, Fountain and Jenkins on numerous occasions while working at the jobsite discussed the desirability of joining an established union and as a result agreed to have Mason contact Local 631's steward, who was employed at Edison's South Point plant by one of its contractors. On December 5 Mason did so. On December 6 Local 631's steward, whom Strunk knew, delivered membership application cards to Mason while he was working at the jobsite, which he in turn presented to and discussed with his fellow employees, Fountain, Jenkins and Vaughn, during working hours. On December 7 and 8 all four of them signed the cards which the other three returned to Mason on the jobsite. During working hours on December 8 Mason delivered the signed cards on the project to Local 631's steward. Strunk admitted that he was present on the jobsite everyday and frequently observed Respondent's employees at work everyday, which would appear self-evident in view of the limited nature of Respondent's South Point operation and the small number of employees. On December 20 Local 631 filed a representation petition with the Board's regional office in Los Angeles. Either that day or the following day a copy of the petition was air mailed by the Region to Respondent at Tucson.

On several occasions during November and December, Mason requested Strunk to try Mason as a truckdriver, in order to improve his position from that of cleanup man. On December 22

Strunk agreed to do so and instructed Jenkins to take Mason with him on the truck, teach Mason its operation and observe how Mason was able to drive the truck. Jenkins did so and Mason drove the truck both with and without Jenkins throughout that day. Mason continued to operate the truck the following two working days, December 23 and December 27. On December 22 Strunk left the South Point facility to spend the Christmas holidays in Tucson with Gibbons. During this period they discussed the operations at South Point. Strunk returned to the jobsite on the morning of December 28, at which time Jenkins, whom I credit, informed Strunk that Mason had driven the truck almost all of the time while Strunk was gone, and that Mason had done a good job, his only fault being that he was a little careless, but that that was no problem and that Mason would make Respondent a good truckdriver. Strunk made no comment. Strunk, whom I do not credit unless otherwise corroborated, denied that Jenkins had said that Mason was a good driver and contended that Jenkins had reported that Mason was a poor and careless driver. Although Mason worked the entire day of December 28 and was in personal contact with Strunk, Strunk admittedly said nothing to Mason about his alleged poor truckdriving.

On the afternoon of December 28, John Knight, the owner of a business in Bullhead City, visited Strunk at the jobsite and observed Mason working. Knight informed Strunk that Mason had injured his back while working for

Knight in the past and had cost him a lot of money by bringing suit for Mason's injury. According to Strunk, whom I do not credit, he replied that he was dissatisfied with Mason in any event. Later that day in Bullhead City Strunk talked to Olson who was at home on extended sick leave and allegedly told Olson that Strunk was going to fire Mason because he was worried about Mason claiming a back injury against Respondent and bringing suit. However, Strunk admitted that he knew all about Mason's prior back injury and litigation before employing him, and that in fact on October 15 had Mason sign a formal release stating that Mason had received a release from his doctor as being fit to work, that Respondent was not responsible for any of his back injuries received prior to his employment, and that he would not at any time bring suit against Respondent for such back injuries. The record fails to establish, and Respondent does not contend, that Mason had any trouble with, or complaints about, his back while working for Respondent. Nevertheless, Strunk claimed that the principal reason for his discharge of Mason that evening was because of Knight's report concerning Mason's back injury and his litigation against Knight's company. Olson told Strunk that Mason had had a disagreement with a former employer in Bullhead City. Strunk allegedly talked with another friend in Bullhead City, who informed him that Mason had had "trouble" at two other companies where he had worked. Strunk also claimed that he was

dissatisfied with Mason's work performance as cleanup man from the outset of his employment in October.

About 7 p.m. that evening Strunk called Mason, told him not to report to work the following morning, that he was fired, and that Strunk would give him the reason when he brought his check to him the following morning. Inasmuch as Mason had received no complaints or warnings from Strunk whatsoever, he was of the view that his discharge was the result of his organizing activities on the job for Local 631. Mason called Jenkins and told him what had occurred. Jenkins agreed that the reason for Mason's discharge was probably his distribution of the Local 631 cards on the jobsite. Jenkins called Strunk and asked why he had fired Mason. According to Jenkins, whom I credit, Strunk never told him why Mason was fired. Strunk admitted that he did not tell Jenkins about the "information" Strunk had received from Knight, allegedly the principal reason for Mason's discharge. When Strunk asked Jenkins why he had called, Jenkins replied that Strunk would learn the following morning. Jenkins went to Mason's home. The two men decided to picket Respondent's operation the following day and prepared picket signs reading: "Union organizer fired by scab Ash Haulers, Gibbons Trucking Co." They agreed to meet the following day at the main gate of the Edison plant at 6:30 a.m.

They did so and started picketing

with their signs. A number of union members of one or more of Edison's contractors honored and joined the picket line. About 7 a.m., Fountain arrived for work, discussed the situation with Mason and Jenkins, agreed that Mason had been fired for his union activities and joined the picket line. Vaughn was at home on sick leave December 28 and December 29. Strunk appeared at the picket line about 8 a.m. and asked the men what was occurring. They showed him the picket signs as quoted above. He asked who their spokesman was and Jenkins agreed to be. Strunk and Jenkins proceeded in Strunk's truck to his office. During the drive in, Strunk told Jenkins that the men should have waited another day because Gibbons was coming to South Point the next day to negotiate a contract with the Ash Haulers. Jenkins asked Strunk why he had fired Mason. Strunk replied that he would tell him about it sometime. According to Strunk, Jenkins said that the men wanted to see Gibbons that day in order to negotiate a contract. Strunk admitted that he asked Jenkins why the employees had gone over to Local 631, and that Jenkins replied that the Ash Haulers were useless and not doing the employees any good and they wanted to join a union which could accomplish something. Strunk then called Gibbons. Strunk told Jenkins that Gibbons could not be there until the next day and they returned to the picket line. During the drive back to the picket line, Strunk complained about the employees striking and

wondered aloud what he could do about it. Jenkins told Strunk that he knew what he could do about it if he wanted. Strunk in substance replied that he had no alternative but to give the men their final checks. Jenkins and Strunk conceded that they both had reference to discharging or terminating the striking employees. Strunk informed Jenkins that Strunk was going to Bullhead City to get Mason's checks. Jenkins suggested that he pick up the other employees' checks. The checks for the prior week had been mailed from Tucson to Bullhead City. Jenkins informed the other employees of his entire conversation with Strunk.

As soon as Strunk learned about the picketing, he called Gibbons at his home to inform him of it. According to Gibbons, whom I do not credit unless otherwise corroborated, Strunk said he did not know why the men were striking, although he had just read the picket signs, been told by the strikers, and had a conversation with Jenkins during which Jenkins asked him why he had fired Mason, which Strunk refused to answer. Gibbons called his attorney in Phoenix. Gibbons then went to his office, where for the first time he found in his mail a copy of Local 631's petition from the Board. He again contacted his attorney who advised him that he could hire permanent replacements for the striking employees and could not bargain with the Ash Haulers or anyone else as long as the representation petition of Local 631 was pending

before the Board. Strunk was in contact with Gibbons several times on December 29. Later that day Gibbons informed Strunk that Gibbons could not negotiate with the Ash Haulers or the men unless they withdrew their support from Local 631 and Local 631 withdrew its petition from the Board. Strunk admitted that Gibbons mentioned both withdrawal of the cards by the men from Local 631 and Local 631's withdrawal of its petition. Gibbons also asked Strunk if he needed any replacements whom Gibbons could immediately fly up. Strunk replied that he did not because Edison was not producing much ash and he needed no additional help at the time.

About 11 a.m. Jenkins called Local 631, informed it of Mason's discharge and the strike activity and requested support. Local 631 replied that it would look into it and see what it could do to help, which Jenkins reported to the other men. Strunk proceeded to Bullhead City, picked up the checks of all four men for the prior week and wrote personal checks for the two days of the current week for all four, including Vaughn, who was at home on sick leave and knew nothing about the strike activity. Strunk then went to Vaughn's home. Strunk admittedly interrogated Vaughn about his membership in Local 631 and whether or not he had joined it with the others. Vaughn admitted that he had signed a card for Local 631 and went along with the others

in supporting Local 631. Strunk said that he could not see why Vaughn went along with Local 631 since he was a director of the Ash Haulers. Vaughn replied that it was because they had made no progress in bargaining through the Ash Haulers. Although Vaughn was on sick leave and knew nothing about Mason's discharge and the strike before Strunk told him, Strunk gave Vaughn both of his checks, thereby terminating his employment.

Strunk returned to the picket line and presented Mason and the two striking employees, Jenkins and Fountain, with two checks each, one for the prior week and one for the two preceding days, thereby terminating their employment as he earlier had advised Jenkins he intended to do. Although Strunk told Mason the evening before that Strunk would tell Mason the reason for his discharge on the morning of December 29, Strunk did not do so. That same day Strunk hired Wendell Hill to replace Mason. Allegedly on December 28, prior to the strike, Gibbons entered into an arrangement with an employee to report to the jobsite in the future when and if Strunk needed him.

There may have been some misunderstanding in the minds of Gibbons and Strunk about the advice of Respondent's attorney, but there is no confusion in the record as to what Strunk told the employees. Strunk had conversations with Jenkins and some of the other men on practically a daily basis from

December 29 through January 4, 1972. Strunk repeatedly told the strikers that they could not return to work and that Gibbons would not negotiate with them or the Ash Haulers until they arranged to have Local 631's petition withdrawn from the Board. On the evening of December 29, Strunk told Jenkins that Gibbons was sorry that he had not gotten to South Point earlier and would like to have the employees have Local 631 withdraw its petition and that he then would negotiate a contract with them. Jenkins reported this statement to the other employees.

On the morning of December 30 Vaughn joined the others on the picket line after informing them that he had been terminated at home by Strunk the previous day, and after the strikers informed Vaughn about their picketing because of Mason's discharge. At this point all of the employees except Olson, who was on extended sick leave, were picketing. That morning, Jenkins again called Local 631, and was advised that it could not sanction the strike and could do nothing to help the employees until it had a ruling from the Board. This resulted in dissatisfaction with Local 631 among the employees. Around noon that day Jenkins and Fountain had two conversations with Strunk during which they advised him all of the men were willing to come back to work if they could get a contract signed by Gibbons and if they could all return, including Mason. Strunk replied that they could return

to work but Mason could not. Fountain answered that they would not return unless they all returned. Fountain asked Strunk why he fired Mason and Strunk refused to reply, stating that he had his own reasons and maybe someday he would tell them. The record establishes that from the outset Strunk knew that the employees were striking because of his discharge of Mason, in their view because of his union activities. On the evening of December 30 Strunk called Jenkins again, told him that Strunk had spoken with Gibbons and that he would be glad to have them all except Mason come back to work if they would have Local 631's petition withdrawn from the Board. Jenkins replied that they might be able to work something out if they could get some of the benefits they had previously requested, including backpay for holidays they had worked, paid vacations and certain hospitalization benefits. On the evening of December 30 Strunk visited Fountain at his home and told him that if the employees would have Local 631 withdraw its petition Gibbons would negotiate a contract with the Ash Haulers and the men could return to work. Strunk further informed Fountain that he should decide whether to stick with Local 631 or go with the Ash Haulers.

The picketing continued through December 30th and 31st. On the 31st, the men stopped picketing about 2 p.m. There was no picketing thereafter. On the 31st, Jenkins and Mason talked with Strunk and told him the employees

would be willing to negotiate a contract with Gibbons through the Ash Haulers if Gibbons would agree to some of the demands the employees had made. Strunk called Jenkins that evening and said that if the strikers would arrange to have Local 631's petition withdrawn Gibbons would be willing to negotiate a contract with them or the Ash Haulers and that they could return to work. Jenkins again repeated what the men wanted and Strunk agreed that their requests were good negotiable items. Strunk told Jenkins that all of the men except Mason had a job as long as they wanted one and Strunk wanted them to come back to work. Jenkins replied that before the men had Local 631 withdraw its petition they would have to have some assurance that Gibbons would definitely negotiate and sign a contract. During all of the conversations between Jenkins and Strunk it was always the position of the employees that they would not return to work unless all four, including Mason, returned. There were many conversations back and forth between Jenkins and Strunk because Strunk always had to check with Gibbons before Strunk could reply to Jenkins' various proposals.

On January 1, 1972, Jenkins and Mason had another conversation with Strunk at the plant. Jenkins told Strunk that on Monday, January 3, 1972, the employees would go to Local 631 in Las Vegas to get the petition withdrawn if he would agree to some of their previously expressed demands such as

higher wages, medical insurance and the payment of a portion of Olson's hospital bill. On the evening of January 1 Strunk visited Vaughn at his home and told him that if the employees had Local 631 withdraw its petition Strunk could put them back to work and that if they didn't return to work Gibbons would replace them and even if Local 631 won the election the replacements would remain and the striking employees would be out of jobs. The record establishes that Strunk solicited each of the employees individually, except Mason, to have Local 631 withdraw its petition, in which event Strunk would return them to work and Respondent would negotiate a contract with the Ash Haulers. That evening Strunk called Jenkins and said that Gibbons was willing to negotiate all of the employees' demands as long as they got Local 631 to withdraw its petition. Strunk repeated that he wanted the employees to return to work as soon as possible. When Jenkins advised him that they were going to Local 631 in Las Vegas on Monday to try to get the petition withdrawn, Strunk replied that if they went early in the morning they should be back about noon and be able to work that afternoon if they had the petition withdrawn. On and after December 30, it is apparent that the strikers were willing to negotiate through the Ash Haulers once again, having become dissatisfied with Local 631's refusal to support them, and that Respondent was willing to do so and have them return to work if they could get Local 631 to

withdraw its petition. The same situation prevailed on December 31 and January 1, when Jenkins and the striking employees agreed to visit Local 631 on January 3 to try to get its petition withdrawn.

The four employees went to Local 631's office on Monday morning, January 3rd, and requested it to withdraw its petition. Local 631 refused. Local 631's business agent then prepared an unconditional offer to return to work for Jenkins, Vaughn and Fountain. The offer they signed was addressed to Gibbons Trucking Company and read: "The undersigned unconditionally hereby offer to return to work." It was dated January 3 and signed by all three. Local 631's agent instructed them to deliver it to Strunk and unconditionally offer to return to work. He advised them that such was not needed in Mason's case, because he had been discharged and his situation was legally different than that of the strikers. That evening the employees delivered their signed unconditional offer to return to work to Strunk, but he refused to permit their return to work unless and until they had Local 631 withdraw its petition. They advised him that Local 631 was unwilling to withdraw its petition. Strunk then called Gibbons, who said that he did not believe that Local 631 had tried to withdraw its petition from the Board that day because January 3rd was a Federal legal holiday and the Board's office was not open. Later that evening Strunk called Jenkins and relayed this statement to

him. The record establishes that as of that time Gibbons and Strunk were still trying to get the employees other than Mason to return to work, upon the condition that they had Local 631 withdraw its petition from the Board. On January 4, 1972, Strunk called Jenkins again and asked him if he thought it would do any good to have Respondent's lawyer "shake up" Local 631 to try to get it to withdraw the petition. Strunk concluded the conversation by stating "I guess it is going to wind up in court." This was the last contact between Strunk and the striking employees.

According to Gibbons, whom I do not credit unless otherwise corroborated, his attorney advised him to replace the striking employees immediately. According to Gibbons, he hired replacements for all the striking employees between December 28 and December 31, although the record establishes that such employees were not in fact hired but only that arrangements were made between them and Gibbons for them to report to work at the South Point jobsite when and if Strunk needed them in the event the strikers did not return to work. On December 28, before the strike commenced and anyone knew anything about it, Gibbons entered into an arrangement with David L. Drake to report in the future when and if Strunk needed him. Apparently Gibbons made his arrangement with Drake in order to replace Mason, because Gibbons' Tucson foreman had advised Gibbons that day that Strunk had terminated one of the South Point employees.

However on December 29 Strunk hired Hill to replace Mason. On December 29 Gibbons entered into a similar arrangement with two other men, Daniel Kinerk and Michael Bates, the latter already employed by Gibbons at another location, to report to Strunk at the South Point jobsite at a later date when and if he needed them. On December 30 or 31, Gibbons entered into a like arrangement with a former employee for future reporting to Strunk when and if needed. Respondent contended that it had thus hired permanent replacements for all of the striking employees before January 3, 1972, the date of their unconditional offer to return to work. However the record establishes that Respondent had not in fact hired any replacements but had merely entered into arrangements for their future employment in the event that the strikers did not return to work, and that at all times to and including January 4, 1972, made clear to the discharged and striking employees, except Mason, that it wanted them to return to work as soon as possible when and if they had Local 631 withdraw its petition from the Board. Contrary to the testimony of Gibbons that he had hired "permanent replacements", Strunk admitted that at all times to and including January 4 he wanted the strikers to return to work and was willing to have them do so if they could get Local 631 to withdraw its petition, patently an admission that they had not been permanently replaced. Strunk admitted that prior to January 4 Gibbons never

told him that the striking employees had been replaced. Strunk admittedly knew that Gibbons had "replacements" available when and if needed if the strikers could not return to work, i.e., were unable to persuade Local 631 to withdraw its petition.

At all times from the first day of the strike Gibbons advised Strunk that he was "covered" by help which Gibbons could furnish whenever needed, and Strunk consistently informed the striking employees that he wanted them to return to work as soon as possible and would accept them at any time if they could get Local 631 to withdraw its petition from the Board. Strunk understood the distinction. He testified that as of January 3, 1972 and prior thereto he had not been advised that the striking employees had been replaced, but that he had been advised that he was "covered", which he understood meant that Gibbons had men available to replace the striking employees when and if they failed to return to work. None of the so-called replacements reported for work at the plant until January 7, 1972, after it was clear that Local 631 would not withdraw its petition. Respondent hired the four "replacements", thus, including Hill, increasing its work force by one as of January 7, 1972, because no further negotiations occurred between Strunk and the discharged and striking employees and none of them were permitted to return to work. Gibbons admitted that he informed Strunk that the men could return to

work as long as they met his condition of having Local 631 withdraw its petition. The record establishes and I find that at all times Gibbons and Strunk were willing to negotiate with the men individually or as the Ash Haulers and return them to work, provided that they arranged to have Local 631 withdraw its petition from the Board. On January 6, 1972, after all the incidents herein, Strunk finally told Mason at the latter's insistence that he had been discharged because of his unsatisfactory work and because of Strunk's conversation with Knight about Mason's prior back injury and litigation.

C. Domination and Interference with the Formation and Administration of, and Other Support to, the Ash Haulers

The complaint alleged that on and after August 29, Respondent through Strunk initiated, formed, sponsored and promoted the Ash Haulers, and assisted, dominated, contributed to the support of and interfered with the administration of the Ash Haulers. As hereinabove found, after Respondent's problems at South Point because its employees were not unionized, Strunk, with the approval of Gibbons, suggested to the employees that they form an independent union. Strunk informed the employees that the organization of an independent union would be a good idea in order to prevent their loss of employment. The record establishes that

Strunk not only suggested but also initiated, organized and led the employees in the creation of the Ash Haulers. He made the original suggestion to Olson and they in turn persuaded the other two employees then employed. When the employees were unable to secure an attorney to set up such an organization, Strunk, with the assistance of Gibbons, referred them to an attorney in Las Vegas who set up the Ash Haulers. Strunk was one of its three organizers and directors and one of its two officers. When the members indicated their inability to pay the attorney's fees of more than $1000 for organizing the Ash Haulers, Strunk assured them that Respondent would take care of it. Thereafter Respondent advanced Olson the money to pay most of such fees. None of such fee was paid by any of the members. In addition, only Strunk and Olson paid the required initiation fee and Olson's payment was effectively refunded to him by Respondent. At the first meeting of the Ash Haulers concerning contract proposals to Respondent, Strunk was the leader and furnished a form of contract which he suggested that the members follow. Strunk handled all of the subsequent negotiations with Gibbons for the Ash Haulers. Strunk led and actively participated in all of the meetings at which the members considered their proposals and Respondent's counterproposals. During the period after the strike began and Respondent was aware of Local 631's petition to the Board, Respondent consistently made

clear to the employees that it would bargain with and enter into a contract with the Ash Haulers if the striking employees could get Local 631 to withdraw its petition. Strunk continued as secretary-treasurer of the Ash Haulers until after the events herein. Thus the record establishes and I find that Respondent initiated, organized, dominated, interfered with, and contributed financial and other support to, the Ash Haulers, thereby dominating and interfering with the formation and administration of, and contributing financial and other support to, the Ash Haulers in violation of Section 8(a)(2) and (1) of the Act.

D. Interference, Restraint and Coercion

The complaint alleged that on or about December 29 Respondent by Strunk threatened an employee that future employment and a guarantee of future employment was conditioned upon the employees' abandoning their support for Local 631. As hereinabove found on December 29 Strunk, after telling Jenkins that Strunk wished the strikers had waited one more day because Gibbons was planning to come up and sign a contract with the Ash Haulers the following day, and refusing to tell Jenkins why Strunk had fired Mason, on their drive back to the picket line after learning about the employees joining Local 631, complained about the employees striking and wondered aloud what he could do about it. Jenkins replied that Strunk knew what he could do about it if he wanted.

Strunk then said that he had no alternative but to give the men their final checks. Both men conceded that they had reference to Strunk's terminating the employees. Clearly this constituted a threat by Strunk to terminate the strikers because of their concerted activity to protest Mason's discharge and/or their transfer of allegiance to Local 631. Later the same day Strunk carried out his threat by terminating not only the strikers but also Vaughn. I conclude and find that such threat constituted interference, restraint and coercion in violation of Section 8(a)(1) of the Act.

The complaint alleged that on or about December 29 Respondent by Strunk interrogated a unit employee at his home concerning whether he had signed a card for Local 631. This allegation had reference to Strunk's conversation with Vaughn on the morning of December 29 at his home when Strunk admittedly interrogated Vaughn as to whether he had signed an authorization card for Local 631 and was in accord with the other employees in their support of Local 631, both of which Vaughn admitted. Until Strunk told him, Vaughn knew nothing about Mason's discharge or the ensuing strike. After ascertaining that Vaughn had joined Local 631 and was in accord with the other employees in supporting it, Strunk terminated Vaughn by giving him his final check. I conclude and find that the aforesaid interrogation, accompanied by Strunk's complaint

concerning Vaughn's decision to support Local 631 while he was a director of the Ash Haulers, constituted interference, restraint and coercion in violation of Section 8(a)(1) of the Act.

The complaint alleged that between December 29 and January 2, 1972, Respondent by Strunk at the South Point facility told its employees that Respondent would sign a contract immediately with the Ash Haulers if the employees would withdraw their support from Local 631. As hereinabove found, Strunk made such statements to various of the employees during that period of time. During their first conversation on December 29 when Jenkins acted as spokesman for the three picketing employees, Strunk stated that he wished the employees had not struck that day because Gibbons was planning to come up the following day and sign a contract with the Ash Haulers. That evening Strunk, after talking with Gibbons several times, told Jenkins that Gibbons wanted the employees to persuade Local 631 to withdraw its petition and that he would then negotiate a contract with them. All of Strunk's statements to Jenkins were reported by him to the other employees.

Again on the evening of December 30 Strunk told Jenkins that he had talked to Gibbons, who would be glad to have all of the men except Mason return to work if they would have Local 631's petition withdrawn from

the Board. This was after Local 631 had informed the employees that it would not sanction their strike or assist them. Jenkins replied that they might be able to work something out if Respondent would grant some of the benefits the employees had been requesting. Again on the evening of December 31 Strunk told Jenkins that if the strikers could arrange to have Local 631's petition withdrawn Gibbons would negotiate a contract with them and they could all return to work. Strunk also told Jenkins that the contractual requests of the men were good negotiable items, that Strunk wanted them to come back to work and that they would all, except Mason, have a job as long as they wanted. During all of these conversations Strunk made clear that Respondent would negotiate and sign a contract with the Ash Haulers for the men if they withdrew their support from Local 631 and persuaded it to withdraw its petition. As a result all four employees did try to persuade Local 631 to withdraw its petition.

On the evening of January 1 Strunk again told Jenkins that Gibbons was willing to negotiate all of the employees' demands as long as they got Local 631 to withdraw its petition, and that Strunk wanted them to return to work as soon as possible. When Jenkins informed Strunk that on Monday they were going to Las Vegas to seek the withdrawal of the petition Strunk replied that if they were successful they could return to work that afternoon.

The record establishes and I find that Strunk repeatedly told the employees that Respondent would negotiate and sign a contract with the Ash Haulers on their behalf if they would withdraw their support from Local 631 and persuade it to withdraw its petition, thereby interfering with, restraining and coercing its employees in violation of Section 8(a)(1) of the Act. 2/ Moreover during these same conversations Strunk also made clear that the employees would not be reinstated to their positions unless they persuaded Local 631 to withdraw its petition, thus coupling a threat of reprisal with a promise of benefit.

E. Discrimination in Hire or Tenure, Terms or Conditions of Employment

1. The discharge of Mason

The complaint alleged that on or about December 28 Respondent discharged Mason and since that date failed and refused to reinstate him because of his union or concerted activities. Mason was hired by Strunk on October 4 as the cleanup man to replace Fountain, who as on extended sick leave. The day before Strunk informed Mason of the existence of

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2/ N.L.R.B. v. Exchange Parts Co., 375 U.S. 405 (1964); and Great Plains Steel Corp., 183 NLRB No. 96 (1970).

the Ash Haulers. On October 29, because of Fountain's return, Mason was laid off but was recalled to work on November 3. Respondent's entire complement at South Point consisted of only four employees. Mason's job duties were limited to a confined area where the ashes were dumped from Edison's bins into Respondent's truck. As hereinabove found, Strunk was present at this jobsite everyday and regularly observed the men, including Mason, as they worked. In the latter part of November Strunk advised Mason to withdraw his membership in a Teamsters' local in Phoenix because it would serve no purpose to continue it inasmuch as Respondent had no contract with the Teamsters, including Local 631. As a result of the employees' dissatisfaction with the Ash Haulers and the progress of negotiations, they frequently discussed among themselves at the jobsite the desirability of seeking other union representation. These conversations went on for some time and in all probability were overheard by Strunk.

On December 5 the employees agreed to try to join Local 631 and requested Mason to contact its stewart on the project site. Mason did so. On December 6 Local 631's job steward, well known by Strunk, delivered to Mason at his jobsite while working membership application cards to be signed by the employees. Mason delivered these cards to the others while working at the jobsite. The following day the others returned the signed cards to Mason while working at the jobsite.

Mason then delivered the four signed cards to Local 631's steward. All of this occurred within the confines of the project and substantially all at the jobsite where Strunk was regularly present. The size of the unit and the work site make it extremely improbable that Strunk would not have been aware of these activities. He knew Local 631's job steward from his prior contact and knew that Mason had been a member of another local of the Teamsters. Under the circumstances, I conclude and find that Respondent through Strunk was aware of Mason's activities on behalf of Local 631. The General Counsel also argues that Respondent must have received Local 631's petition on or before December 28, inasmuch as it was air mailed from Los Angeles to Tucson on December 20 or 21. However, Gibbons testified unequivocally that he did not receive the eptition in the mail until the morning of December 29 after the strike had started. While it seems unlikely, in view of the Christmas mail rush it is not impossible that the petition was not delivered through the mail to Respondent's Tucson office until December 29, and I conclude and find that the General Counsel has failed to sustain his burden of proof with respect to that contention.

On December 22, Strunk's last day at the jobsite before his Christmas holiday, Strunk promoted Mason to truckdriver. Strunk directed Jenkins to instruct Mason and check him out on the job. Mason drove the truck on

December 22, 23 and 27, the three following workdays. Upon Strunk's return to the job on the morning of December 28, Jenkins advised him that Mason had done a good job driving the truck and would make Respondent a good truckdriver. Although Strunk was in personal contact with Mason that day, Strunk made no statements to him. Allegedly as the result of a conversation with Knight that morning, plus coversations with Olson and Hill that afternoon, Strunk decided to fire Mason that evening, primarily because of the "information" he had obtained from Knight. The record establishes that all of Respondent's reasons for discharging Mason were not only without merit but contrary to fact. Thus Strunk testified that his principal reason for discharging Mason was because Knight had informed him that day that Mason had injured his back while working for Knight and had cost Knight considerable money by bringing suit for such injury. However, Strunk admitted that he was fully ware of Mason's back injury and the litigation before employing him, and in fact had Mason sign a release agreeing never to sue Respondent for any back injuries occurred prior to his employment by Respondent. Moreover the record establishes that Mason had no complaints about his back while employed by Respondent. Thus Strunk's principal reason, i.e., concern about possible litigation by Mason against Respondent for such injury, was proven to be without substance.

An additional reason advanced by

Strunk was dissatisfaction with Mason's work performance from the outset of his employment in October. The record demonstrates the contrary. On October 29 Strunk laid Mason off because of the return of Fountain, yet on November 3 when Strunk needed additional help he reemployed Mason, thus demonstrating Strunk's satisfaction with Mason's performance to that date. As a result of Mason's requests, on December 22 Strunk decided to promote Mason to truckdriver and had Jenkins instruct him and check him out. This further evidenced Strunk's satisfaction with Mason's prior performance. Contrary to the credited testimony of Jenkins, Strunk advanced as an additional reason for Mason's discharge the claim that Jenkins had reported that Mason was a poor and careless truckdriver. As hereinabove found, Jenkins reported to Strunk that Mason was a good truckdriver.

During Strunk's Christmas holiday visit with Gibbons, they discussed the affairs of the Ash Haulers and Respondent's operation at South Point. Immediately after Strunk's return to the job, he fired Mason without any warning, allegedly for the above reasons which have been found to be without merit. In addition, Strunk refused to tell Mason why he was fired, and that evening and on succeeding days refused to tell Jenkins and Fountain why Mason had been fired, although Respondent was confronted with a strike of all of its employees because of Mason's discharge. During the ensuing discussions

with the strikers, Strunk consistently refused to consider Mason's reinstatement, although he was never able to advance a reason. The record establishes Respondent's animosity towards Local 631 as the result of its contact with Gibbons in April and its subsequent contacts with Strunk and Olson during the summer of 1971.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces me, and I find, that Respondent's alleged reasons for discharging Strunk were pretextual, and that its real reason was his organizing activities on behalf of Local 631, thereby discriminating against him in violation of Section 8(a)(3) and (1) of the Act.

2. The discharge of Vaughn

The complaint alleged that on or about December 29 Respondent discharged Vaughn and thereafter failed and refused to reinstate him because of his union activities and/or because he had joined the strike. As hereinabove found Vaughn was at home on sick leave on December 29, the day the strike commenced. After the above-found conversation with Jenkins, Strunk went to Bullhead City, secured the prior week's checks for all four employees and wrote personal termination checks for all four, including Vaughn. Strunk then went to Vaughn's home, informed him of Mason's discharge and the strike, of which Vaughn was not previously aware, and interrogated him about his membership

in Local 631 and whether he agreed with the other employees in supporting Local 631. After Vaughn admitted that he had signed an authorization and membership card and was in sympathy with the others in supporting Local 631, Strunk criticized him for not remaining loyal to the Ash Haulers and presented him with his final check, thereby terminating him. The following morning Vaughn joined the others in picketing, after informing them of his discharge and they had informed him of the purpose of the strike. The record clearly establishes, and I find, that Strunk terminated Vaughn because of his admitted membership in Local 631 and his support of Local 631 with the other employees, thereby discriminating against him in violation of Section 8(a)(3) and (1) of the Act.

3. The discharge of the strikers, Jenkins and Fountain

The complaint alleged that on or about December 29 Respondent discharged Vaughn, Fountain and Jenkins because they had joined the strike and/or because of their union activities, and thereafter refused to reinstate said employees to their former or substantially equivalent positions although on January 3, 1972 they made an unconditional offer to return to work. On December 29 three employees, Mason, Jenkins and Fountain, were picketing. On December 30 Vaughn joined the picketing. As hereinabove found, Mason was discriminatorily discharged on December 28 and Vaughn on December 29,

and hence neither of them were strikers within the meaning of the Act, inasmuch as they were not in a position to voluntarily withhold their services. Both joined the picketing and apparently the General Counsel, as well as Local 631 as demonstrated by its preparation of Vaughn's unconditional offer to return to work, mistakenly viewed Vaughn as one of the striking employees. It is well settled that a discriminatorily discharged employee is not required to make an unconditional offer to return to work but on the contrary his employer is required to offer him reinstatement to his former or substantially equivalent position, whereas, striking employees, whether economic or unfair labor practice strikers, must make an unconditional offer to return to work before their employer is required to reinstate them. However, a discriminatorily discharged employee who subsequently joins a going strike is not entitled to backpay until his strike activity terminates.

After discharging Vaughn on the morning of December 29, Strunk proceeded to the picket line and, as he had earlier threatened, terminated the striking employees, Jenkins and Fountain, by presenting them their final checks. At the same time Strunk gave Mason his final check. As hereinabove noted, Respondent contended that the strike was for recognition, that the striking employees voluntarily quit and that Respondent had permanently and lawfully replaced them. The record contains no evidence that the strike was for

recognition, nor is there any evidence that the striking employees voluntarily quit their employment, which Respondent concedes. On the contrary the record clearly establishes that from the outset the strike was in protest of Mason's discharge. A consideration of the entire record establishes, and I find, that Respondent discharged the striking employees, Jenkins and Fountain, because of their protected concerted activity, striking, and because of their membership in Local 631, thereby discriminating against them in violation of Section 8(a)(3) and (1) of the Act.

On January 3, 1972 Fountain, Jenkins and Vaughn presented Respondent with a written unconditional offer to return to work, which Respondent rejected and refused unless they could persuade Local 631 to withdraw its petition. Because Vaughn had joined the strike after his discriminatory discharge, this also constituted notice to Respondent that he was abandoning his strike activities and available for immediate reinstatement. Inasmuch as I have found that Mason's discharge was discriminatory and the strike was in protest thereof, it follows, and I find, that from its inception the strike was an unfair labor practice strike. Assuming arguendo that Mason's discharge was not discriminatory, the discriminatory discharge of Vaughn and/or the subsequent discriminatory discharges of the strikers would have converted the strike to an unfair labor strike and

tended to prolong it. It is well settled that unfair labor practice strikers are entitled to immediate reinstatement upon their unconditional offer to return to work regardless of the employment of replacements. 3/ It follows and I find that Respondent's refusal to reinstate the unfair labor practice strikers, Jenkins and Fountain, upon their unconditional offer to return to work constituted further discrimination against them in violation of Section 8(a)(3) and (1) of the Act.

Assuming arguendo that the strike was an economic strike, it is well settled that such strikers are entitled to reinstatement to their former positions upon their unconditional offer to return absent the employment of permanent replacements and other considerations not pertinent herein. As hereinabove found, the record establishes that Respondent had not hired permanent replacements for the striking employees, but had consistently, from the time of the strike until after their unconditional offer to return to work, made clear at all times that Respondent wanted them to return to work and was willing to accept their return provided they were able to persuade Local 631 to withdraw its petition from the Board. Accordingly, even if they are assumed to have been economic strikers, I conclude and find that Respondent's refusal to reinstate them upon their unconditional offer to return to work constituted discrimination in violation of Section

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3/ Mastro Plastics Corp., 350 U.S. 270 (1956).

8(a)(3) and (1) of the Act.

F. Additional Issues

The complaint also alleged that Respondent engaged in the above-found acts of interference, restraint and coercion, domination of, interference with and assistance to the Ash Haulers, and discriminatory discharges and refusals to reinstate, for the purpose of undermining Local 631 and destroying its majority status in order to evade Respondent's obligation to bargain with Local 631. As found above, Respondent threatened its employees with discharge for engaging in a strike and for supporting Local 631, interrogated an employee concerning his union activities and membership, informed the employees that Respondent would sign a contract with the Ash Haulers if they would withdraw their support from Local 631 and persuade it to withdraw its petition, dominated and interfered with the formation and administration of the Ash Haulers and contributed financial and other support to it, discriminatorily discharged Mason and Vaughn, discriminatorily discharged employees for engaging in a strike, and discriminatorily refused to reinstate such strikers upon their unconditional offer to return to work. The record establishes, and I find, that Respondent engaged in such unfair labor practices for the purpose of destroying Local 631's majority status and thereby evading Respondent's obligation to bargain with it.

The complaint alleged, Respondent admits and I find the following to be a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

> All ash haulers employed by Respondent at its facility at South Point, Nevada, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The complaint further alleged that, to remedy the above-found unfair labor practices under the above-found circumstances, an order should issue requiring Respondent to recognize and bargain with Local 631 as the exclusive bargaining representative of the employees in the aforesaid appropriate unit.

As hereinabove found, on December 7 and 8 four of the five employees in the appropriate unit signed unambiguous authorization cards as well as applications for membership and delivered them to Local 631, all of which cards were properly authenticated and received in the record. I conclude and find, as alleged in the complaint but denied by Respondent, that on December 8, Local 631 was designated by a majority of the employees in the appropriate unit as their bargaining representative and was then and thereafter the exclusive bargaining representative of the employees in the aforesaid appropriate unit.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce, and Local 631 and the Ash Haulers are labor organizations, within the meaning of the Act.

2. By interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By dominating and interfering with the formation and administration of the Ash Haulers, and contributing financial and other support to it, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act.

4. By discharging Mason and Vaughn because of their union activities, by discharging Jenkins and Fountain because of their concerted activity, striking, and their union activities, and by refusing to reinstate Jenkins, Fountain and Vaughn upon their unconditional offer to return to work because of their concerted and union activities, Respondent engaged in discrimination to discourage membership in Local 631 and participation in protected concerted

activities, thereby engaging in unfair practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. All ash haulers employed by Respondent at its facility at South Point, Nevada, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times on and after December 8, Local 631 has been and now is the exclusive representative for the purposes of collective bargaining of the employees in the above unit within the meaning of Section 9(a) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action as provided in the Order recommended below, which I find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act. Although the complaint did not allege a refusal to bargain, and none is found, Respondent, as alleged and

hereinabove found, engaged in the above-found unfair labor practices for the purpose of destroying Local 631's majority status and thereby evading Respondent's obligation to bargain collectively with it. As further alleged in the complaint, it is now well settled that under such circumstances a bargaining order is warranted and indeed required as the only effective remedy available. 4/ Accordingly, I shall recommend a bargaining order. Because it has been found that Respondent dominated, interfered with and assisted the Ash Haulers, I shall recommend that Respondent completely disestablish the Ash Haulers. Because of the character and scope of the unfair labor practices found, I shall recommend a broad cease and desist order. 5/

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c)

4/ N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575 (1969); and Great Plains Steel Corp., 183 NLRB No. 96 (1970).

5/ N.L.R.B. v. Express Publishing Company, 312 U.S. 426 (1941); N.L.R.B. v. Entwhistle Mfg. Co., 120 F.2d 532 (4th Cir. 1941); Consolidated Industries, Inc., 108 NLRB 60 (1954), and cases cited therein.

of the Act, I hereby issue the following recommended: 6/

ORDER

G. L. Gibbons Trucking Service, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge or refusal of future employment because of their union or protected concerted activities, including striking.

(b) Interrogating coercively its employees concerning their union activities or membership.

(c) Telling employees that it will negotiate or enter into a contract with another labor organization of they will withdraw their support from their

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6/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

chosen labor organization or persuade such labor organization to withdraw its representation petition filed with the National Labor Relations Board.

(d) Threatening striking employees that they will not be reinstated to their former positions unless they persuade their chosen labor organization to withdraw its representation petition filed with the National Labor Relations Board.

(e) Dominating or interfering with the administration or formation of the Ash Haulers of Nevada, Inc. or any other labor organization of its employees, or contributing financial or other support to said Ash Haulers or any other labor organization of its employees.

(f) Recognizing, or in any manner dealing with, said Ash Haulers, or any reorganization or successor thereof, as a representative of any of its employees for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of work or any other terms and conditions of employment.

(g) Discouraging membership in Teamsters Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization of its employees, by discharging employees because of their union or

protected concerted activities, including striking, or by failing and refusing to reinstate unfair labor practice strikers to their former or substantially equivalent positions after their unconditional offer to return to work, or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(h) In any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Withdraw all recognition from said Ash Haulers as a representative of any of its employees for the purpose of dealing with Respondent concerning grievances, labor diputes, wages, rates of pay, hours of work, or any other terms and conditions of employment, and completely disestablish said Ash Haulers as such representative.

(b) Upon request, bargain collectively with the aforesaid Local 631 as the exclusive representative of its employees in the appropriate unit found herein with respect to rates of pay, wages, hours and all other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Offer LeRoy Mason, Mark Vaughn, Ronnie I. Jenkins and Brian Fountain each immediate and full reinstatement to his former job, or if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make each whole for any loss of pay he may have suffered by payment to him of a sum of money equal to that which he would normally have earned from, in the case of Mason, December 28, 1971, the date of his discharge, and in the cases of Vaughn, Jenkins and Fountain, January 3, 1972, the date of their unconditional offer to return to work, to the date of the above-required offer of reinstatement by Respondent, less the net earnings of each during said periods (Crosset Lumber Company, 90 NLRB 289, together with interest thereon at the rate of 6 percent per annum (Isis Plumbing & Heating Co., 138 NLRB 716).

(d) Immediately notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(e) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records

and reports and all other records necessary to determine the amount of backpay due under this Order.

(f) Post at its office in Tucson, Arizona and its facility in South Point, Nevada copies of the attached notice marked "Appendix." 7/ Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

7/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(g) Notify the Regional Director for Region 31, in writing, within 20 days from the date of receipt of this Decision what steps Respondent has taken to comply herewith. 8/

Dated:

Robert L. Piper
Trial Examiner

8/ In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."

NLRB-4727
(3-69)

TXD-(SP)-105

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT discourage membership in Teamsters Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization of our employees, by discharging employees because of their union or protected concerted activities, including striking, or by failing and refusing to reinstate unfair labor practice strikers to their former or substantially equivalent positions after their unconditional offer to return to work, or in any other manner discriminating against our employees in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT dominate or interfere with the formation or administration of, or contribute financial or other support to, any labor organization of our employees.

WE WILL NOT recognize, or in any manner deal with, the Ash Haulers of Nevada, Inc., or any reorganization or successor thereof, as a representative

of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of work or any other terms and conditions of employment.

WE WILL NOT threaten our employees with discharge or refusal of future employment because of their union or protected concerted activities, including striking.

WE WILL NOT coercively interrogate our employees concerning their union activities or membership.

WE WILL NOT tell our employees that we will negotiate or enter into a contract with another labor organization if they will withdraw their support from their chosen labor organization or persuade such labor organization to withdraw its representation petition filed with the National Labor Relations Board.

WE WILL NOT threaten striking employees that they will not be reinstated to their former positions unless they persuade their chosen labor organization to withdraw its representation petition filed with the National Labor Relations Board.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of any of the rights guaranteed them by the National Labor Relations Act.

WE HEREBY completely disestablish the

Ash Haulers of Nevada, Inc. as a representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of work or any other terms and conditions of employment, and withdraw all recognition from said Ash Haulers as such representative.

WE WILL, upon request, bargain collectively with the aforesaid Local 631 as the exclusive representative of our employees in the appropriate unit noted below with respect to rates of pay, wages, hours and all other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The appropriate unit is:

> All ash haulers employed by us at our facility at South Point, Nevada, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL offer LeRoy Mason, Mark Vaughn, Ronnie I. Jenkins and Brian Fountain each immediate and full reinstatement to his former job, or if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make each whole for any loss of pay he may have suffered as a result of our discrimination against him.

All of our employees are free to become, remain or refrain from becoming or remaining, members of the above-named or any other labor organization.

G. L. GIBBONS TRUCKING SERVICE, INC.
(Employer)

Dated _____ By _____
(Representative)
(Title)

WE WILL NOTIFY immediately the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Blvd., Los Angeles, California. Telephone No.: (213) 824-7357.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1465

G.L. GIBBONS TRUCKING SERVICE, INC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The court of appeals rendered no opinion. The Board's decision and order (A. 1-54)[1] are reported at 199 NLRB No. 88.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-7a) was entered on January 21, 1974. The petition for a writ of certiorari was filed on April 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "A." references are to the separate appendix to the petition. "Tr." references are to the stenographic transcript of the hearing before the Trial Examiner.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company discharged employee LeRoy Mason because of his union activities.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158), are set forth at p. 3 of the petition.

STATEMENT

The Board found that petitioner Company, which performs an ash hauling service for Southern California Edison Company violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation of, and lending assistance to, Ash Haulers, of Nevada, Inc. ("Ash Haulers"), a labor organization (A. 28-30). It also found that the Company violated Section 8(a)(1) of the Act by interrogating its employees concerning their activities on behalf of Local 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 631"), by threatening to discharge and refusing to reemploy its employees because of such activity, by promising to negotiate with Ash Haulers only if the employees withdrew support from Local 631, or persuaded Local 631 to withdraw the representation petition filed with the Board, and by threatening to withhold employment from its employees unless they persuaded Local 631 to withdraw the representation petition filed with the Board, and by threatening to withhold employment from its employees unless they persuaded Local 631 to effect such withdrawal (A. 30-34). Finally, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate

employees LeRoy Mason (A. 34-39), Mark Vaughn (A. 39-40), Ronnie I. Jenkins, and Brian Fountain (A. 40-43) because they engaged in union or other concerted activities.

The Board ordered the Company to cease and desist from the unfair labor practices found, to disestablish Ash Haulers, to bargain upon request with Local 631, to offer the aforesaid employees reinstatement and back-pay, and to post appropriate notices (A. 3-5, 49-54). The court of appeals enforced the Board's order (Pet. App. 1a).

Petitioner here contests only the Board's finding that the discharge of LeRoy Mason was unlawful (Pet. 4). The facts relevant to that issue are as follows:

The Company's ash disposal operation at Southern California Edison's Plant in South Point, Nevada, utilizes two to four employees, who work in a limited area under the direct supervision of foreman William Strunk, son-in-law of Company President G.L. Gibbons (A. 3-4). The disposal operation consists of dumping ashes from hoppers close to Edison's boiler into a large "Euclid" dump truck, and hauling the ashes to canyons and open areas on the premises where they are then dumped from the truck, spread, and covered with dirt by a tractor. Ordinarily one man operates the hopper, another cleans up, a third drives the truck, and a fourth drives the tractor to spread the ashes (Tr. 7-9, 12-13).

Le Roy Mason was hired by Strunk in October 1971, as "cleanup man" (A.9). In early December, Mason expressed his dissatisfaction to fellow employees Fountain, Jenkins, and Vaughn, over the dilatory contract negotiations the Company was conducting with the

Ash Haulers.[2] The employees agreed that Mason should make contact with the steward of Teamsters Local 631, which represented Edison's employees, concerning possible Teamsters affiliation (A. 11-12; Tr. 193-194). Pursuant to Mason's request, Local 631's steward, whom Strunk knew (A. 12; Tr. 244), delivered membership application cards to Mason while he was working at the jobsite. Mason, in turn, gave the cards to, and discussed them with, the other three employees during working hours. On December 7 and 8, the three employees returned their signed cards to Mason on the jobsite. During working hours on December 8, Mason delivered those cards and his own signed card to Local 631's steward (A. 12; Tr. 129-135).

On December 22, pursuant to earlier requests by Mason, Strunk told Jenkins to teach Mason how to drive the "Euclid" truck (A. 12-13; Tr. 137-138, 191). Strunk left the same day to spend Christmas holidays with Gibbons at Tucson, and did not return to South Point until the evening of December 27 (A. 13; Tr. 60). Mason operated the truck part of December 22 and 23 and all of December 27, the next working day (A. 13; Tr. 139, 191, 192).

In the meantime, Strunk and Gibbons discussed their union problems (A. 13; Tr. 306-307). Upon Strunk's return to the job on the morning of December 28, Jenkins informed him that Mason did "real good" driving the truck, that he was "a little careless, but that was no problem," and that he would "make [Strunk] a good driver" (A. 13; Tr. 191, 192-193). The working day passed without incident. At 10 minutes past quitting time, Strunk remarked to the gathered employees, including Mason, "It is time to go home * * * I will see you fellows in the morning * * *" (Tr. 141).

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[2]The Ash Haulers was found by the Board to be an employer dominated union, *(supra,* p. 2).

At 8:15 that evening, Strunk called Mason's home and told him "not to bother to show up next day", that he would bring his check by his home (A. 15; Tr. 65-66, 141-142). When Mason asked why he was being discharged, Strunk replied that he would "tell [him] in the morning" (Tr. 66). Strunk did not do so (A. 19); and when employee Jenkins asked why Mason had been discharged, Strunk replied: "I'll tell you about it sometime" (A. 16; Tr. 199).

The following day, the two remaining employees then working struck to protest Mason's discharge (A. 15-16; Tr. 197-198). Later that day, Strunk discharged the two strikers, as well as a third employee, Vaughn, who was home on sick leave. Strunk discharged Vaughn, who had known nothing about the strike, after visiting him at his home and interrogating him about his membership in Local 631 (A. 16-17, 18-19; Tr. 82, 85-87, 173-175, 200).

The Company contended at the hearing that its abrupt discharge of Mason was motivated by (1) Mason's carelessness during his three-day promotion to truck driver, (2) his inadequate performance of the clean-up work, (3) the possibility that he might sue the Company for a previously incurred back injury, and (4) his previous "fallouts" with a dentist, a boat shop owner, and a marina proprietor in Bullhead City (A. 37-38; Tr. 57-65).

The Trial Examiner concluded that "[t]he record establishes that all of [the Company's] reasons for discharing Mason were not only without merit but contrary to fact" (A. 37).[3] The Examiner further re-

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[3]See the Examiner's analysis at A.37-38.

jected the Company's assertion that it had no knowledge of Mason's union activities prior to his discharge. The Examiner pointed out that the four employees' union activities had "occurred within the confines of the project and substantially all at the jobsite where Strunk was regularly present. The size of the unit and the work site make it extremely improbable that Strunk would not have been aware of these activities. He knew Local 631's job steward from his prior contact and knew that Mason had been a member of another local of the Teamsters"[4] (A. 36). Accordingly, the Examiner concluded that the Company's alleged reasons for discharging Mason were "pretextual, and that its real reason was his organizing activities on behalf of Local 631" (A. 39).

The Board affirmed the Examiner, adding (A. 2, n.2) that, although owner Gibbons disclaimed any part in hiring or firing prior to the strike, which he contended alerted him for the first time to the union activity (see Tr. 287), the record shows that he talked by telephone with Strunk on December 28, one day before the strike, and arranged a replacement for Mason (Tr. 291, 327; G.C. Exh. 17).

ARGUMENT

The only issue presented by the petition is whether substantial evidence supports the Board's finding, sustained by the court below, that employee Mason was discharged because of his union activities. Such an issue does not

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[4]In late November, Mason had asked Strunk if he should activate his membership in a Teamsters local in Phoenix to which he had belonged before acquiring his South Point job (A. 11; Tr. 56, 126). Strunk said "no" and added that it "would be a good idea" if Mason were to get a withdrawal from the local since the Company did not have a Teamsters contract (*ibid.*).

warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 487-488. In any event, as shown, the record amply supports the Board's findings.

Contrary to petitioner's contention (Pet. 18-20), the propriety of inferring employer knowledge of union activity from the circumstances has been long settled by this Court. "The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence that the employer knew * * * [the discharged employees] had joined * * * [the union] and was displeased or wanted to make an example of them." *National Labor Relations Board* v. *Link-Belt Co.,* 311 U.S. 584, 602. Moreover, the Board did not, as petitioner contends (Pet. 10), "invoke the 'small plant' doctrine * * * [without] in any way discuss[ing] or analyz[ing] the doctrine or articulat[ing] the reasons why it was applicable * * *." The Board's inference of Company knowledge of Mason's union activity took place in a "small plant." The Board relied as well on the circumstances that Strunk admitted being "all over the plant" in regular supervision of the employees, and knew the Teamsters representative who came to deliver the cards (A. 36). Furthermore, the Company's reasons for discharging Mason did not withstand scrutiny, and its anti-union animus was independently established by other unfair labor practices which are not contested here.[5]

[5]See *A.J. Krajewski Mfg. Co.* v. *National Labor Relations Board,* 413 F. 2d 673, 676 (C.A. 1) ("in-plant union activity" in "relatively small" plant, combined with employer vacillation as to reason for discharge, sufficient circumstantial evidence of company knowledge of union activity.

is not based solely on the fact that all the union activity

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Solicitor General.

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JOHN S. IRVING,
Deputy General Counsel,
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MAY 1974.

DOJ-1974-05